

TITLE 16  
DEPARTMENT OF REGULATORY AGENCIES  
CHAPTER 303  
OFFICE OF CONSUMER PROTECTION  
UNFAIR OR DECEPTIVE PRACTICES IN ADVERTISING

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Historical Note: This chapter is based substantially upon State of Hawaii, Office of Consumer Protection, Regulation V, Rules Relating to Unfair or Deceptive Practices in Advertising. [Eff 3/25/77; R 6/19/81]

§16-303-1 Scope and purpose. (a) This chapter is adopted to assist consumers and business persons by:

- (1) Defining certain acts and practices which violate section 480-2, Hawaii Revised Statutes;
- (2) Protecting consumers from unscrupulous individuals and businesses engaging in unfair or deceptive acts or practices; and
- (3) Encouraging the development and perpetuation of fair consumer sales practices.

(b) This chapter shall not apply to the sale of merchandise sold for the purpose of resale in the regular course of business. [Eff 6/19/81] (Auth: HRS §487-5) (Imp: HRS §§480-2, 487-5)

§16-303-2 Severability. If any provision of these rules, or the application thereof to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of these rules which can be given effect without the invalid provision or application, and to this end the provisions of these rules are severable. [Eff 6/19/81] (Auth: HRS §487-5) (Imp: HRS §487-5)

§16-303-3 Definitions. As used in this chapter:

"Advertisement" means any oral, written, or graphic statement or representation made by or at the request of the seller;

"Merchandise" means any objects, wares, food, goods, commodities, or services;

"Price comparison" means the direct comparison in any advertisement of a seller's current price for merchandise with any other price for such merchandise, or the making of other price reduction claims, statements of value, or savings claims with respect to such merchandise, if expressed in dollars, cents, fractions, or percentages;

"Rain check" means a guarantee of a consumer's entitlement to purchase advertised merchandise at the advertised price within a reasonable time;

"Regular price" means the price, in the same quantity and quality and with the same service at which the seller of the merchandise has sold or offered to sell such merchandise for a reasonably substantial period of time in the recent, regular course of the seller's business;

"Seller" means any person engaged in the business of selling merchandise and includes individuals, corporations, partnerships, associations, and their agents or employees. [Eff 6/19/81] (Auth: HRS §487-5) (Imp: HRS §§480-2, 487-5)

§16-303-4 Use of the word "sale" and words of similar import. (a) Consumers rightfully expect that whenever the seller uses the word "sale" in any advertisement, the seller is offering to sell the advertised merchandise at a price which is less than the seller's regular price. It is the express intent of this section to prohibit the practice of a seller advertising merchandise for "sale" or using words of similar import when in fact the advertised sale price is not less than the seller's regular price.

(b) It shall be an unfair or deceptive act or practice for any seller to:

(1) Use the word "sale" or words of similar import in any advertisement when the advertised price is not less than the seller's regular price; or

- (2) Fail to clearly and conspicuously identify the merchandise which is not being offered at a price less than the seller's regular price in any advertisement when the word "sale" or words of similar import are used; or
- (3) Fail to state in any advertisement when the word "sale" or words of similar import are used, the period during which the advertised price will be effective, provided that when the seller places only a specific item or items on "sale," and the seller believes in good faith that the quantity of such items will not be sufficient to meet the reasonably anticipated consumer demand for the planned duration of the "sale," the seller need not specify the period during which the advertised price will be effective if the seller specifies the exact quantity of items available at the advertised price; or
- (4) Fail to conspicuously post the advertised "sale" prices in the store; or
- (5) Use "going out of business" or terms of similar import when the store is not in fact going out of business as advertised. [Eff 6/19/81] (Auth: HRS §487-5) (Imp: HRS §§480-2, 487-5)

§16-303-5 Use of the word "free." (a) It shall be an unfair or deceptive act or practice for any seller to advertise "free" merchandise in connection with the sale of other merchandise except in conformity with this section. When the consumer is told that merchandise is "free" if other merchandise is purchased, the word "free" indicates that the consumer is paying nothing for the "free" merchandise and no more than the regular price for the other merchandise. A consumer has a right to believe that the seller will not directly and immediately recover, in whole or in part, the cost of the "free" merchandise by marking up the price of the merchandise that must be purchased, by substituting inferior merchandise, or by other means. It is the express intent of this section to prohibit the practice of advertising or offering merchandise as "free," when in fact, the cost of the "free" merchandise is passed on to the consumer, in whole or in part, by raising the price of the merchandise that must be purchased in connection with the "free" merchandise or by decreasing the quality or quantity of merchandise that must be purchased in connection with the "free" merchandise.

(b) "Free," as used in this section, includes the use of such words or phrases as "bonus," "gift," "free-of-charge," "prize," "absolutely without charge," "buy one, get one free," "two-for-one-sale," "1 cent sale," "50% off with purchase of two," and words of similar import or meaning, which would reasonably lead a person to believe that the person may receive something of value, entirely or in part, without the

requirement of additional compensation. "Free," as used in this section, does not include a bona fide quantity discount.

(c) When using the word "free" in advertisements, all the terms, conditions, and obligations upon which receipt and retention of the "free" merchandise are contingent shall be set forth clearly and conspicuously. In the case of oral statements or representations, such terms, conditions, and obligations shall be stated orally at the outset of the offer of "free" merchandise. In the case of written statements or representations, such terms, conditions, and obligations shall appear next to the offer of "free" merchandise. Disclosure of the terms of the offer set forth in a footnote of an advertisement to which reference is made by an asterisk or other symbol placed next to the offer shall not constitute adequate disclosure. A notice of the existence of an offer of "free" merchandise on packaged merchandise shall not be regulated by this section provided that the notice is not otherwise unfair or deceptive.

(d) It shall be an unfair or deceptive act or practice for any seller to offer "free" merchandise when the price of other merchandise required to be purchased exceeds the seller's regular price.

(e) No offer of "free" merchandise shall be made in connection with the introduction of new merchandise offered to be sold at a specified price unless:

- (1) The offerer will discontinue the offer within ninety days after the offer is first stated or specifies the duration of the offer and will discontinue the offer at the specified date which date shall in no event be more than six months after the offer is first stated;
- (2) The offerer will commence selling the merchandise promoted, separately, at a price no less than the price at which it was promoted with the "free" merchandise; and
- (3) The offerer will continue to sell the merchandise for a reasonable period of time after the termination of the offer at a price no less than the price at which it was promoted with the "free" merchandise, unless compliance becomes impossible because of circumstances beyond the seller's control.

(f) Except as provided in subsection (e), continuously advertising the same offer of "free" merchandise is an unfair or deceptive act or practice since the seller's price for merchandise to be purchased by consumers in order to avail themselves of the "free" merchandise will, by lapse of time, become the regular price for the "free" merchandise together with the other merchandise required to be purchased. Under such circumstances, an advertisement of "free" merchandise is illusory and unfair or deceptive. [Eff 6/19/81] (Auth: HRS §487-5) (Imp: HRS §§480-2, 487-5)

§16-303-6 Price comparisons. (a) Price comparison advertising is a form of advertising in which current prices are compared with former or future prices or other stated values to demonstrate price reductions or cost savings. While price comparisons accurately reflecting market values in the trade area provide consumers with useful information in making value comparisons and market buying decisions, price comparisons based on arbitrary or inflated prices or values can only serve to deceive or mislead. The seller's failure to disclose material information essential to consumer understanding of the price comparisons being made can also serve to deceive or mislead. It is the express intent of this section to insure that the reference price used in a price comparison is a figure which provides meaningful guidance to the consumer.

(b) It shall be an unfair or deceptive act or practice for any seller in any advertisement to make a price comparison:

- (1) Which is not based on the seller's regular price, future price, competitor's price or a manufacturer's suggested retail price; or
- (2) Where the prices compared are not disclosed; or
- (3) Of merchandise which differ in composition, grade or quality, style or design, model, name or brand, kind or variety, or service and performance characteristics, unless the general nature of the material differences is clearly and conspicuously disclosed in the advertisement with the price comparison.

(c) Seller' future prices. A price comparison may be made by any seller based on the seller's future price only if:

- (1) The effective date of the future price increase is within ninety days after the price comparison is first stated in any advertisement or the effective date of the future price increase is disclosed in the advertisement;
- (2) The future price increase takes effect as stated in the advertisement or, if not stated in the advertisement, within ninety days after the price comparison is first stated in the advertisement; and
- (3) The merchandise is continuously offered at a price not less than the advertised future price for a reasonable period of time after the effective date of the price increase, except where compliance becomes impossible because of circumstances beyond the seller's control, and the merchandise is displayed in a reasonable manner consistent with the display of merchandise of a similar type.

(d) Competitor's prices. A price comparison may be based on a competitor's price only if a substantial number of sellers in the trade area in which the price comparison is made are selling the merchandise at that price.

(e) Manufacturer's suggested retail prices. A price comparison may be based on a manufacturer's suggested retail price only if a substantial number of sellers in the trade area in which the price comparison is made are selling the merchandise at that price.

(f) Seller's seasonal prices. A price comparison of merchandise of a seasonal nature in the seller's place of business based on a price used during the immediately preceding selling season shall not be regulated by this section provided that it is not otherwise unfair or deceptive.

(g) Miscellaneous price comparisons. A price comparison shall be unfair or deceptive if it contains terms which state or suggest conditions which are not true. Examples of such unfair or deceptive price comparisons include:

- (1) Advertising a price as wholesale when such advertised price is not a wholesale price.
- (2) Representing prices to be factory prices when such prices are not the prices paid by persons purchasing directly from the factory. [Eff 6/19/81] (Auth: HRS §487-5) (Imp: HRS §§480-2, 487-5)

§16-303-7 Availability of advertised merchandise. (a) Consumers rightfully expect advertisements of merchandise to represent a bona fide intent to make such merchandise available to all those attracted to the place of business to purchase the advertised merchandise, unless the advertisement discloses that quantities of such merchandise are limited.

- (b) It shall be an unfair or deceptive act or practice for any seller to:
- (1) Fail to clearly and conspicuously identify in any advertisement any merchandise that is not available in quantities sufficient to meet reasonably anticipated demands by stating:
    - (A) The quantity of such merchandise available; or
    - (B) That such merchandise is available in limited quantity or words of similar import; or
  - (2) Fail to state in any advertisement the quantity of merchandise which may be purchased at the advertised price by an individual consumer, when there is such a limitation; or
  - (3) Fail to have the advertised merchandise available at or below the advertised price for the period during which the advertised price will be effective, provided that it shall be a defense under this paragraph if the seller can demonstrate and document that the advertised offer was made in good faith, based on the fact that the advertised merchandise

was ordered in adequate time for delivery in quantities sufficient to meet reasonably anticipated demands, and that the unavailability of merchandise was due to circumstances beyond the control of the seller; or

- (4) Fail to have the advertised merchandise conspicuously and readily available at or below the advertised price during the effective period covered by the advertisement. If not conspicuously and readily available, clear and adequate notice shall be provided that the merchandise is in stock and may be obtained upon request; however all circumstances surrounding failure to have advertised merchandise conspicuously and readily available at or below advertised prices will be considered in determining whether the act or practice is deemed to be unfair or deceptive under this paragraph; or
  - (5) Use any text, statements, illustrations, drawings, or photographs in advertisements which do not fairly describe or depict the advertised merchandise; or
  - (6) Fail to specifically, clearly, and conspicuously disclose in all advertisements any exception, limitation, or restriction applicable to individual stores in a chain.
- (c) In determining whether the act or practice is deemed to be unfair or deceptive under this section, the following may be considered:
- (1) The availability of a rain check policy or similar policy which will not, in and of itself, constitute compliance with this section;
  - (2) A pattern of conduct indicating an intent to not fulfill the reasonably anticipated demand for advertised merchandise; and
  - (3) The point in time the advertised merchandise became unavailable.
- (d) This section shall not apply to:
- (1) Any oral statements or representations made at the seller's place of business, or to any statements or representations contained on any label, tag, or sign attached to, printed on, or accompanying merchandise in the seller's place of business; or
  - (2) Any statements or representations made in a catalog designed primarily for direct sales to consumers, rather than to attract consumers to the seller's place of business. [Eff 6/19/81] (Auth: HRS §487-5) (Imp: HRS §§480-2, 487-5)

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§16-303-8 Reporting. The director of the office of consumer protection or a representative may require persons whose conduct is governed by this chapter to submit a report in writing setting forth information on which an advertisement within the scope of this chapter was based. The report shall be submitted within fourteen days after receipt of a written demand from the director. Additional time for cause shown may be granted upon request. [Eff 6/19/81] (Auth: HRS §487-5) (Imp: HRS §§480-2, 487-5)

§16-303-9 Civil penalty. Any person, firm, company, association, or corporation violating any provision of this chapter shall be fined a sum of not less than \$500 nor more than \$10,000 for each violation. The civil penalties shall be collected in a civil action brought by the director of the office of consumer protection on behalf of the State. [Eff 6/19/81] (Auth: HRS §§480-3.1, 487-5) (Imp: HRS §§480-2, 480-3.1, 487-5)

§16-303-10 Scope of powers. While the applicability of this chapter has been restricted to unfair or deceptive advertising in retail sales of merchandise there is no intent to limit the jurisdiction of the office of consumer protection over unfair or deceptive advertising only to the situations enumerated in this chapter. [Eff 6/19/81] (Auth: HRS §487-5) (Imp: HRS §§480-2, 487-5)



DEPARTMENT OF REGULATORY AGENCIES

The repeal of State of Hawaii, Office of Consumer Protection, Regulation V, and the adoption of chapter 303, Office of Consumer Protection Unfair or Deceptive Practices in Advertising, on the Summary Page dated June 1, 1981, were adopted on June 1, 1981, following public hearings held in Hilo on May 18, 1981, Kona on May 19, 1981, Kahului on May 20, 1981, Honolulu on May 23, 1981, and Lihue on May 29, 1981, after public notice was given in the Honolulu Advertiser and the Honolulu Star-Bulletin on April 27, 1981.

These rules shall take effect ten days after filing with the Office of the Lieutenant Governor.

/s/ Stanley D. Suyat

STANLEY D. SUYAT

Director of Consumer Protection

/s/ Mary G. F. Bitterman

MARY G. F. BITTERMAN

Director of Regulatory Agencies

APPROVED AS TO FORM:

/s/ Ronald Shigekane

Deputy Attorney General

/s/ George R. Ariyoshi

GEORGE R. ARIYOSHI

Governor of Hawaii

Date: June 6, 1981

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June 9, 1981

Filed